Supreme Court, U. S.
SEP 15 1972
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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1972

NO. 72-277

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HENRY C. FORTENBERRY, Father of
GARY C. FORTENBERRY, Deceased,
*Petitioner*,

*v.*

NEW YORK LIFE INSURANCE COMPANY,
*Respondent*.

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## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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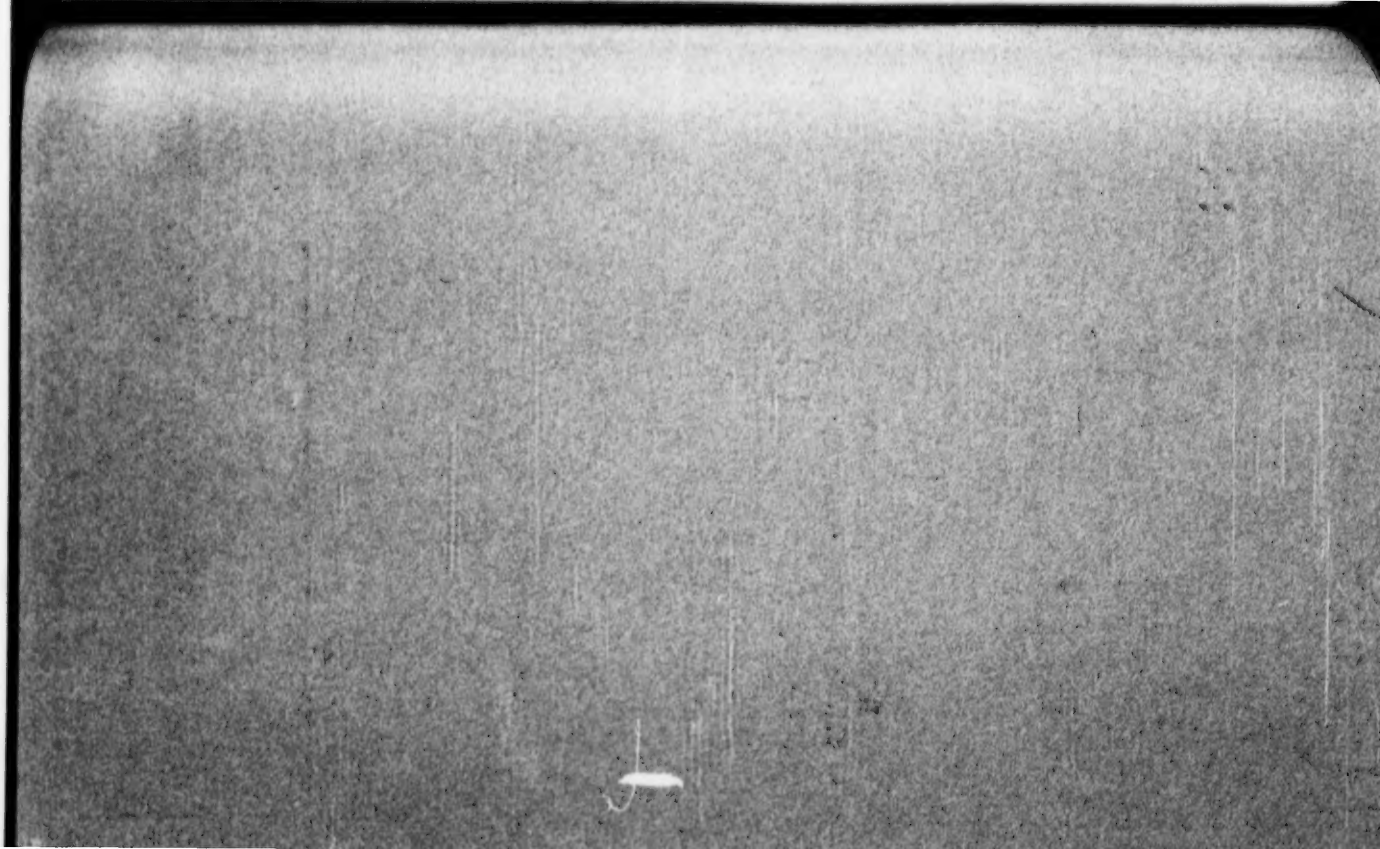

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## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America*

Your respondent, the New York Life Insurance Company, respectfully represents to this Honorable Court the following:

## STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

The respondent does not agree with the Statement of Issue as presented by the petitioner and therefore submits the following question as the issue presented for review:

DID THE DISTRICT JUDGE ABUSE HIS DISCRETION IN GRANTING THE RESPONDENT A NEW TRIAL?

THE RESPONDENT CONTENDS THE ANSWER SHOULD BE "NO."

## STATEMENT OF THE CASE

This is an action based on a contract entered into between respondent, New York Life Insurance Company, and the deceased son of the petitioner, Henry C. Fortenberry. The policy of insurance provided for $32,679.00 in life insurance and further provided that if the insured's death resulted directly, and independently from all other causes, from accidental bodily injury, the respondent would pay an additional sum of $32,679.00. The wife of the insured was the designated and named first beneficiary of said policy. The petitioner, Henry C. Fortenberry, father of the insured, was the designated and named second beneficiary of said policy. Following the untimely death of the insured in an automobile accident in June, 1969, the respondent paid the face amount of the policy with accidental death benefits to the named first beneficiary, the insured's wife, Lois Elaine Simpson Fortenberry, who filed the only claim for the policy benefits with the respondent.

Petitioner filed a suit alleging a change in beneficiary, and the case was tried before a District Judge and a jury. At the close of petitioner's proof respondent moved the Court for a directed verdict, which motion was overruled. The respondent renewed its motion for a directed verdict at the close of all the proof, which motion was again overruled. The case was submitted to the jury, whereupon the jury returned a verdict in favor of the petitioner. Respondent timely filed its motion for judgment notwithstanding

the verdict or in the alternative for a new trial, as amended. The District Judge overruled the motion for a judgment notwithstanding the verdict, but granted respondent's motion for a new trial, whereupon a second trial was held and a verdict was rendered by the jury for the respondent. Petitioner only appealed the decision of the District Judge in granting respondent a new trial. The Sixth Circuit Court of Appeals affirmed the action of the District Judge in granting a new trial.

## ARGUMENT

The respondent respectfully submits that the petition for writ of certiorari should be denied for the following reasons:

### I

The District Judge did not abuse his discretion in granting respondent a new trial, and the Sixth Circuit Court of Appeals was correct in affirming the decision of the District Judge.

Petitioner relies heavily on the case of *Duncan v. Duncan*, Appendix B, in his petition for writ of certiorari, 377 F.2d 49 (1967), in support of his argument that a District Judge in Tennessee is strictly limited in his authority to grant a new trial, whereas the respondent takes the position that the District Judge has a wider latitude in this area, and that the basic test is whether or not there has been an abuse of discretion on the part of the District Judge. In support of its position respondent relies on the following cases:

*Felton v. Spiro*, 78 Fed. Rep. 576 (6th Cir., 1897).
*Cross v. Thompson*, 298 F.2d 186 (6th Cir., 1962).

*Mooney v. Henderson Portion Pack Co.*, 339 F.2d 64 (6th Cir., 1964). *Cutter v. Cinn. Union Terminal Co.*, 361 F.2d 637, (6th Cir., 1966). *Hopkins v. Coen*, 431 F.2d 1055 (6th Cir., 1970).

Although the *Spiro* case, *supra*, contained the word "overwhelming" weight of the evidence, the other cases cited above, and many others from the various circuits, seem to hold that it does not require "overwhelming" weight. As an example, in the case of *United States v. Bucon Const. Co.*, 430 F.2d 420, at page 423, the 5th Circuit used this language:

> "In passing on a motion for a new trial the Court may and should exercise a sound discretion, and its ruling thereon will not be reviewed in an Appellate Court in the absence of a clear abuse of discretion."
>
> "A Trial Judge, on a motion for a new trial may set aside a verdict and grant a new trial, if in his opinion the verdict is against the clear weight of the evidence * * * or will result in a miscarriage of justice even though there may have been substantial evidence which would prevent the direction of a verdict."

In 1941 the Fourth Circuit, speaking through Judge Parker, in the case of *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, laid down the following rules with respect to the question here involved in this language:

> "Under Federal rule, it is the duty of the District Judge on motion therefor to set aside verdict and grant a new trial, if Judge is of opinion that verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict."

At Page 354, the Court stated as follows:

"To the Federal Trial Judge, the law gave ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so required."

Also on Page 354, the following language appears:

"It is equally well settled, however, that the granting or refusing of a new trial is a matter resting in the sound discretion of the Trial Judge, and that his action thereon is not reviewable upon appeal, save in the most exceptional circumstances."

In the Fifth Circuit, *United States of America v. 1160.96 Acres of Land, Holmes Co. Miss.*, reported in 432 F.2d 910, at page 915, the following language is used:

"A motion for new trial is addressed to the Trial Judge's discretion. He may grant a new trial if he thinks he has committed error; and he may grant one (and he alone can) because he thinks the verdict is wrong, though supported by some evidence. The exercise of his discretion is not ordinarily reviewable on appeal, though a failure to exercise discretion, or an abuse of it, may be corrected."

In the case under consideration, it was obvious that at least five of the jurors did not think the plaintiff had proved his case. We cannot conceive of a circumstance more compelling upon a District Judge to grant a new trial in the interest of justice than that which occurred in this case.

It would appear most appropriate to compare the language of the District Judge in the case under consideration with that of the District Judge in *Duncan v. Duncan, supra.*

In the present case the District Judge in granting the motion for a new trial used the following language:

> "The Court is not satisfied with the verdict; that is to say, it is not satisfied that the evidence supports the verdict."

whereas, in *Duncan v. Duncan*, *supra*, the District Judge stated in granting a new trial as follows:

> "But I am not too happy with the verdict in view of the evidence in the case. It impressed me during this trial that there was almost overwhelming evidence of negligence on the part of the driver. In fact, I was quite surprised when the verdict came in as it did because I thought there was evidence of negligence.
>
> "I am dissatisfied with the verdict. I think it is against the weight of the evidence, and I set the verdict aside and order a new trial in these cases on that ground."

Respondent respectfully submits that there is obviously a vast difference in the language used by the District Judges in the respective cases. In *Duncan v. Duncan* the District Judge expressed the opinion that there was evidence of negligence contrary to the jury's finding and stated further that he was of the opinion that the verdict was against the weight of the evidence, and, as respondent understands the law, a District Judge is not free to re-weigh the evidence and set aside the jury verdict merely because the jury could have drawn inferences or conclusions or because Judges feel that other results are more reasonable. *Duncan v. Duncan*, *supra*.

In the present case the District Judge found that the verdict was not supported by the evidence, and surely this finding cannot constitute an abuse of his discretion,

and upon reaching such a conclusion, he is bound to grant a new trial. Or, to state it differently, it is fundamental that any verdict if it is valid must be supported by the evidence.

It is interesting to note that Judge Peck was the author of the opinion in *Duncan v. Duncan*, *supra*, and that Judge Peck was on the panel which decided the case under consideration and participated in the majority opinion therein.

II

The respondent respectfully submits that the District Judge did not abuse his discretion in granting respondent a new trial because the evidence introduced at the trial did not approach the legal requirement to effect a change of beneficiary on a life insurance policy where surrender of the policy to the insurance company is not required.

Under the authorities in Tennessee the beneficiary of an insurance policy may be effectively changed if the insured substantially complies with the provisions of a policy providing for such a change in beneficiary. Mere unexecuted intention of the insured to change beneficiary is not substantial compliance with policy provisions for changing a beneficiary. Where consent of the insurance company is not required to change the name of the beneficiary in the policy, the announced intention of the insured to change the beneficiary is not alone sufficient to effect the change. In order to effect a change of beneficiary, the insured must not only declare his intention to change the beneficiary, but he must do everything he can to effect the change. This language and its meaning is clearly established by the following Tennessee cases:

*Davis v. Davis*, (1916) 136 Tenn. 520; 190 S.W. 459; *Cronbach v. Aetna Life Ins. Co.*, (1925) 153 Tenn. 362,

284 S.W. 72; *Holmes v. Gooch, Met. Life Ins. Co.*, (1926) 3 Tenn. App. 80; *Holmes v. Interstate Life Ins. Co.*, (1946) 29 Tenn. App. 482, 197 S.W.2d 551; *Mutual Savings Life Ins. Co. v. Cowan*, (1960) 188 F. Supp. 148 (E.D. Tenn.); *Rep. Natl. Life Ins. Co. v. Sackmann*, (1963) 324 F.2d 756 (E.D. Tenn. 6th Cir.); *Cooper v. United States*, (1965) 340 F.2d 845 (E.D. Tenn. 6th Cir.)

The evidence introduced in this case at the trial simply did not approach this legal requirement. The proof, if given its most favorable construction in favor of the petitioner, merely shows that the insured did nothing more than express an intent to change the beneficiary. Upon the trial of the case there were many objections on the admissibility of testimony made by the respondent, and the District Judge permitted the introduction of a considerable amount of such testimony over the objection of the respondent with the explanation to the jury that it was being admitted for the sole purpose of showing the intent to change the beneficiary. Leaving aside the question of whether or not such testimony should have been allowed, the evidence introduced by the petitioner at the trial attempted to show the insured desperately trying to effect a change of beneficiary on his insurance policy before he was suddenly killed in an untimely automobile accident in Georgia while on a bowling trip.

The failure of this picture to materialize is clearly exhibited through the testimony of various witnesses covering a period of a week to ten days, when allegedly the insured would hang up the telephone and announce he was going that moment to the insurance company to sign a change of beneficiary form. If the insured had done this the first time he made the announcement, there would certainly have been no reason to make such further an-

nouncements. It is obvious according to the evidence introduced by the petitioner at the trial that the insured was making this threat virtually every day, and as the evidence clearly shows, the insured at no time carried through with any such declarations. The only possible one which he could have carried through would have been the last one which was in no stronger language or under any different circumstances than the first one.

It is obvious from a reading of this record that the insured knew that he had to take some action other than to only express an intention to change his beneficiary, and the record is entirely silent with respect to any such act or acts having ever been taken by the insured. In the absence of some evidence showing an overt act by the insured to effectuate his intent to change the beneficiary, the District Judge was clearly justified in granting the respondent a new trial.

III

Respondent respectfully submits that it has serious doubt as to whether this is a proper case for consideration by this Honorable Court under the guidelines of Rule 19, Supreme Court Rules. There do not appear to be any special and important reasons for granting the writ of certiorari in this case. No Federal question of substance not heretofore covered by this Court is involved in this case. There is not any conflict between the Circuit Courts of Appeal on the applicable rule of law to be applied in determining if a District Judge has abused his discretion in granting a new trial. Furthermore, there appears to be no conflict between the Circuit Courts regarding the applicable rule of law to be applied when a change of beneficiary on an insurance policy is perfected, where the surrender of the policy is not required.

Petitioner states in his petition that the opinion herein sought to be reviewed is in direct conflict with the opinion rendered in United States Court of Appeals, 5th Circuit, in the case of *O'Neil v. W. R. Grace & Co.*, 410 F.2d 909 (1969). The respondent submits that the opinion herein sought to be reviewed is not in conflict with *O'Neil v. W. R. Grace & Co.* Respondent says simply that the case of *O'Neil v. W. R. Grace & Co.*, was concerned with the standard to be followed in ruling upon a motion for a judgment notwithstanding the verdict. Such standard is not applicable in the case under consideration.

## CONCLUSION

The respondent therefore respectfully submits that the writ of certiorari should be denied.

Respectfully submitted,

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